IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29-09-2006

CORAM

THE HONOURABLE MR. JUSTICE P.K. MISRA
AND
THE HONOURABLE MR. JUSTICE M. JAICHANDREN

O.S.A.Nos.117 to 119 of 2001

Village Connection
rep. by its Partner,
R.K. Soundhar Rajan .. Appellant in OSA.117/2001

Volume Fashions,
rep. By its Partner
Jagadish A. Sadarangani .. Appellant in OSA.Nos.118 & 119/2001

Vs.

M/s. Prakash Transport,
103, Seven Wells Street,
George Town, Chennai 1. .. Respondent in all OSAs

Appeals filed under Order 36 Rule 11 of O.S. Rules, read with Clause 15 of the Letters Patent against the common order passed by the learned single Judge dated 20.9.2000 in Appln.Nos.3042, 2492 and 2009 of 2000 in C.S.Nos.526 of 1997, 386 and 402 of 1998 respectively.

For Appellant : Mr.P. Subba Reddy

For Respondent : Mr.P. Raj Mohan

COMMON JUDGMENT

P.K. MISRA, J

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These three appeals have been filed by the plaintiff against the common order passed by the learned single Judge arising out of C.S.Nos.526 of 1997, 386 and 402 of 1998. The present respondent was the defendant No.2 in C.S.No.526 of 1997 and Defendant No.1 in C.S.Nos.386 and 402 of 1998. The suits were filed claiming different amounts from the defendants 1 to 4 jointly and severally.

2. The basic allegations in the plaint in each case were to the effect that the plaintiff is an exporter of cotton fabrics and was having regular transaction with third defendant organisation based in Kathmandu, Nepal. The plaintiff was making supply of various cotton fabrics. Consignments were made to the third defendant under separate

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invoices as per the terms of the contract. The first and second defendants, who are the transporters, are supposed to deliver the goods to the third defendant only after the third defendant makes the payment to the fourth defendant bank, by whom the Letter of Credit had been opened. It is further alleged that it is the responsibility of the defendants 1 and 2 not to handover the consignments to the third defendant without verifying the payment made by the third defendant to fourth defendant as the fourth defendant is the collecting bank through the bankers of the plaintiff. The goods had been sent through the Bankers of the plaintiff to the Bankers of the third defendant, namely, the fourth defendant. The primary duty of the defendants 1 and 2 is to deliver goods only after obtaining clearance from the fourth defendant. A grave mistake has been done by the defendants 1 and 2 by handing over the goods to the third defendant without making payment to the fourth defendant. In the clauses relating to consignment it has been clearly indicated that "This consignment will not be detained, diverted, re-routed or re-booked without consignee's bank's written permission". However, without the consent of the fourth defendant, the defendants 1 and 2 delivered the goods to the third defendant in collusion with the third defendant, which was unauthorised. In the Way Bill it was also indicated :

> "The Consignment covered by this Lorry Receipt shall be stored at the destination under the control of the Transport Operator and shall be delivered to or to the order of the Consignee Bank whose name is mentioned in the Lorry Receipt. It will under no circumstances be delivered to any one without the written authority from the Consignee Bank or its Order, endorsed on the Consignee Copy or on a Separate Letter of Authority."

It is the further case of the plaintiff that because of the unlawful delivery of goods, the plaintiff has sustained loss. It was further indicated that the plaintiff had issued notice dated 19.10.1995 claiming the entire amount payable in three transactions from the defendants 1 to 4 jointly and severally.

3. The first defendant filed a written statement. In such written statement, while not denying about the booking of the consignments, it was stated that the goods in question had not been delivered. It had been stated that the first defendant's counter part at Nepal is still keeping the goods in their godown and the goods have not been delivered to the third defendant. It was also stated that notice as contemplated under Section 10 of the Carriers Act had not been issued within the stipulated period of six months and, therefore, the suit was liable to be dismissed.

4. Defendant No.2, the counterpart of the defendant at Calcutta, filed a written statement simply adopting the written statement of the first defendant.

5. Application Nos.3042, 2492 and 2009 of 2000 in C.S.Nos.526 of 1997, 386 and 402 of 1998 respectively have been filed on behalf of Defendant No.1, namely, M/s. Prakash Transport, Chennai, (Defendant

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No.2 in C.S.No.526 of 1997) stating that the consignments had been made on 19.10.1994 and 6.1.1995 and it is claimed that notice was issued on 19.10.1995 and since the alleged notice dated 19.10.1994 was beyond six months as contemplated in Section 10 of the Carriers Act, the suit was not maintainable and, therefore, a prayer was made for rejecting the plaint as contemplated under Section 10 of the Carriers Act read with Order 7 Rule 11 CPC.

6. Ultimately, under the impugned common order, the learned single Judge had dismissed the suits on the ground that notice as contemplated under Section 10 of the Carriers Act had not been issued within the stipulated period of six months. The appeals have been filed against such common order.

7. Coming to the main question involved in these appeals, it is contended by the learned counsel appearing for the appellant that the suits should not have been dismissed by invoking Section 10 of the Carriers Act as it was the contention of the plaintiff that Defendant Nos.1 and 2 had delivered the consignments to the consignee without insisting upon the proof relating to payment of the amount or without insisting upon the clearance from fourth defendant bank. It is therefore submitted by him that the suit is not on account of for the "loss or injury to goods" entrusted to the carriers for carriage, but on account of the fact that the carrier in violation of the terms of the contract had delivered the consignments to the consignee without payment to be made through the consignee's bank. It is further submitted by him that the amount was claimed from Defendants 1 to 4 jointly and severally and, therefore, without giving opportunity to the plaintiff to prove its case, the learned single Judge should not have dismissed the suits on the basis of the application filed by the Defendant No.1 or 2 and the entire suit should have been taken up for disposal on merit.

8. Learned counsel appearing for the respondent on the other hand has submitted that the suits must be taken to be essentially the suits for loss or injury to the goods and, therefore, the learned single Judge has rightly dismissed the suits on account of the fact that notice was admittedly issued in October, 1995, whereas the consignments related to December, 1994 or January 1995 and, therefore, the notice is admittedly beyond the period of six months.

9. Keeping in view the purpose for which Section 10 of the Carriers Act has been enacted, it is obvious that the provisions contained in Section 10 should be strictly construed. In the present case, it cannot be said that the suit had been filed for "loss or injury to the goods" strictly speaking, but on account of the fact that the defendants 1 and 2 have allegedly delivered the consignments to the consignee in breach of the contract without payment of the amount to the consignee's bank, namely, the fourth defendant.

10. In such view of the matter, the conclusion of the learned single Judge that the suit is liable to be dismissed as the notice had been issued beyond six months cannot be sustained and such order is hereby quashed. The suits should be decided on merit in accordance with law.

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11. Learned counsel appearing for the respondent raised a preliminary objection to the effect that rejection of the plaint under Order VII Rule 11 is deemed to be a decree as defined under Section 2 (2) of the CPC and, therefore, a regular appeal has to be filed on payment of regular court fee and as such the appeals are not maintainable without payment of proper court fee.

12. This preliminary objection raised by the respondent is not sustainable for the following reasons. The appeal filed can be treated as an appeal against the order as contemplated in the Original Side Rules. Since the order is passed on account of the application filed by Defendant No.1 and such application can be considered as incapable of being valued, the court fee paid can be said to be appropriate.

13. The question relating to payment of court fee can be viewed from another angle. Even in appeals where court fee paid is not sufficient, the court invariably grants time to the appellant to pay the deficit court fee. The suit has been dismissed only on the legal ground relating to non-issuance of notice under Section 10 of the Carriers Act. Now that such question is decided in favour of the appellant, obviously the matter has to be remanded to the trial court for consideration on merit in which event whatever court is paid or liable to be paid is to be refunded to the appellant. Therefore, the question of sufficiency of the court fee paid raised by the defendant recedes into background.

14. In the result, the appeals are allowed and the suits are remanded to the trial court for disposal on merit in accordance with law. There would be no order as to costs.

dpk

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Sub Assistant Registrar, Original Side, High Court, Madras.
2. The Record-keeper, V.R. Section, High Court, Madras.

+ 3 ccs to Mr. P. Subba Reddy, Advocate SR No. 46366 to 46368

GM(CO)
SR/30.10.2006

COMMON JUDGMENT IN OSA.NOS.
117 TO 119 OF 2001

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